

TRAVIS C. CORGAN,  
 Plaintiff,  
 v.  
 JO ANNE B. BARNHART,  
 COMMISSIONER OF SOCIAL SECURITY,  
 Defendant.

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 ) No. 06-3176-CV-S-FJG-SSA  
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This is a proceeding under Titles II and XVI of the Social Security Act, in which plaintiff requested review of the Commissioner's decision denying his application for disability benefits. Plaintiff's claims were denied initially and on reconsideration. On December 5, 2005, an administrative law judge (ALJ) rendered a decision in which she found that Plaintiff was not under a "disability," as defined in the Act. On March 16, 2006, the Appeals Council of the Social Security Administration denied plaintiff's request for review. Thus, the ALJ's decision stands as the final decision of the Commissioner. Plaintiff's appeal is before the Court on Plaintiff's motion for judgment (Doc. No. 9). The facts and arguments are presented in the parties' briefs and will not be repeated here.

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there exists substantial evidence in the record as a whole to support the decision of the Commissioner. Siemers v. Shalala, 47 F.3d 299, 301 (8<sup>th</sup> Cir. 1995). This determination requires review of the entire record, including both evidence in support of, and in opposition to, the Commissioner's decision. Fountain v. Railroad Retirement Bd., 88 F.3d 528, 530 (8<sup>th</sup> Cir. 1996). The Court's role, however, is not to re-weigh the evidence or try the issues de novo. Craig v. Chater, 943 F. Supp. 1184, 1188 (W.D. Mo. 1996) (citing McClees v. Shalala, 2 F.3d 301, 302 (8<sup>th</sup> Cir. 1994)). When supported by substantial evidence, the Commissioner's findings are conclusive and must be affirmed. Richardson v. Perales, 402 U.S. 389, 401 (1971).

Substantial evidence is more than a mere scintilla but less than preponderance. It means such evidence that a reasonable mind would accept as adequate to support a conclusion. Johnson v. Chater, 108 F.3d 178, 179 (8<sup>th</sup> Cir. 1997), citations omitted. The substantial evidence standard, however, presupposes a zone of choice within which the decision makers can go either way, without interference by the courts. Clarke v. Bowen, 843 F.2d 271, 272-73 (8<sup>th</sup> Cir. 1988). "[A]n administration decision is not subject to reversal merely because substantial evidence would have supported an opposite decision." Id. Hence, "if it is possible to draw two inconsistent positions from the evidence and one of those positions represents the agency's finding, we must affirm the decision." Roe v. Chater, 92 F.3d 672, 672 (8<sup>th</sup> Cir. 1996) (quoting Robinson v. Sullivan, 956 F.2d 836, 838 (8<sup>th</sup> Cir. 1992)).

An individual claiming disability benefits has the burden of proving he or she is unable to return to the type of work in which he or she was formerly engaged due to a medically determinable physical or mental impairment that has lasted or can be expected to last for a continuous period of not less than twelve months. 42 U.S.C. § 423(d) (1) (A).

If the claimant succeeds, the burden of production shifts to the commissioner to establish that plaintiff can perform some other type of substantial gainful activity in the national economy. See Young v. Apfel, 221 F.3d 1065, 1069, n. 5 (8<sup>th</sup> Cir. 2000); see also, 68 Fed. Reg. 51,153 - 51,163 (August 26, 2003); 20 C.F.R. § 404.1560(c)(2).

The Court has reviewed the parties' briefs and the record below. Despite this searching review, the Court cannot find substantial evidence in the record to support the Commissioner's decision. Specifically, the Court finds that the RFC formulated by the ALJ failed to adequately take into account plaintiff's need to use a nebulizer during the day to treat his COPD symptoms. Further, the ALJ discredited plaintiff's subjective complaints, and substituted her judgment for that of plaintiff's treating physicians in a manner inconsistent with the goals of Polaski v. Heckler, 739 F.2d 1320 (8<sup>th</sup> Cir. 1984).

Reversal and entry of judgment may be appropriate when a remand would only serve to delay the award of benefits. Porch v. Chater, 115 F.3d 567, (8<sup>th</sup> Cir. 1997) (citing Andler v. Chater, 100 F.3d 1389, 1394 (8<sup>th</sup> Cir. 1996)). The Court finds that the record in this case (especially given plaintiff's combined impairments of bulging disc, degenerative disc disease with chronic low back, leg and hip pain, chronic obstructive pulmonary disease, hepatitis C, and depression) unquestionably supports an award of benefits.

Accordingly, it is hereby **ORDERED** that plaintiff's motion to reverse the final decision of the Commissioner (Doc. No. 9) is **GRANTED**, and the decision of the Commissioner is hereby reversed and judgment shall be entered awarding plaintiff benefits.

**/S/ FERNANDO J. GAITAN, JR.**  
Fernando J. Gaitan, Jr.  
United States District Judge

Dated: December 15, 2006  
Kansas City, Missouri